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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Whaleco Incorporated,
Plaintiff,
v.
employerdictionary.com, et al.,
Defendants.

No. CV-23-02354-PHX-ROS

ORDER

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Plaintiff Whaleco Inc. owns various trademarks containing the word “Temu” (collectively, “Temu marks”). Plaintiff alleges unknown individuals registered five domain names with Arizona-based GoDaddy.com, LLC. The five domain names are: 1) employerdictionary.com; 2) cryptocurrencybettting.com; 3) comboarchives.com; 4) toughestgirlalive.com; 5) and myelectronicshub.website. When registering these domain names, the unknown individuals contracted with Arizona-based Domains by Proxy, LLC, to keep confidential the personal information linked to the registrations.

According to Plaintiff, the unknown individuals who registered the domain names are operating websites at those domain names using the Temu marks without Plaintiff's permission. Plaintiff filed this suit, naming only the unknown individuals as defendants. The sole basis for personal jurisdiction identified in the original complaint was that the unknown individuals had contracted with GoDaddy and Domains by Proxy.

Plaintiff filed a motion for a temporary restraining order primarily seeking to require non-party GoDaddy “lock” the domain names such that they could not be transferred “to

1 another registrant or to a registrar located outside of the United States.” (Doc. 10 at 10).
2 Shortly after that motion was filed, the Court issued an Order requiring Plaintiff file a
3 supplement establishing its basis for believing there was personal jurisdiction over the
4 unknown individuals. The Court noted it was “highly improbable that every individual
5 who registers a domain name with GoDaddy.com is subject to personal jurisdiction in
6 Arizona in suits where GoDaddy is not a party.” (Doc. 14 at 2). The Court also noted the
7 present case presented unique jurisdictional issues compared to other recent cases
8 involving similar claims because the present case did not involve any in rem claims against
9 domain names.

10 On November 22, 2023, Plaintiff filed a supplement addressing personal jurisdiction
11 as well as an amended complaint asserting in rem claims against the five domain names.
12 The supplement argues Plaintiff was entitled to invoke the forum selection clauses in the
13 unknown individuals’ agreements with GoDaddy and Domains by Proxy. The supplement
14 also argues the Court may exercise in rem jurisdiction over the domain names pursuant to
15 U.S.C. § 1125(d)(2)(a)(i). (Doc. 15 at 5). Plaintiff’s latest filings do not establish a
16 plausible basis for personal jurisdiction over the unknown individuals. In addition,
17 Plaintiff’s in rem claims against the domain names do not, at present, appear plausible.

18 Plaintiff’s first argument for personal jurisdiction over the unknown individuals is
19 that they executed contracts with GoDaddy and Domains by Proxy that contain forum
20 selection clauses requiring litigation occur in Arizona. Plaintiff is not a signatory to those
21 contracts, but Plaintiff argues it is still entitled to invoke the forum selection clauses. Non-
22 signatories to a contract are able to invoke a contract’s forum selection clause under some
23 circumstances. *See, e.g., Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5
24 (9th Cir. 1988). But the ability of a non-signatory to do so is limited by what has become
25 known as the “closely-related doctrine.” *Franlink Inc. v. BACE Servs., Inc.*, 50 F.4th 432,
26 439 (5th Cir. 2022). The Ninth Circuit has not provided an in-depth explanation of this
27 doctrine. *Id.* Instead, the Ninth Circuit has merely instructed that litigation involving
28 issues “closely related to the contractual relationship” may be sufficient for a non-signatory

1 to invoke a forum selection clause. *See also Holland Am. Line Inc. v. Wartsila N. Am.,*
 2 *Inc.*, 485 F.3d 450, 456 (9th Cir. 2007) (concluding non-signatories could invoke forum
 3 selection clause because there was a “larger contractual relationship” governed by a forum
 4 selection clause). The contexts in which courts allow non-signatories to invoke such
 5 clauses are quite different from what has been alleged in this case.

6 The closely-related doctrine may apply when there is a significant relationship such
 7 as common ownership or control between the non-signatory and one of the signatories.
 8 *Franlink*, 50 F.4th at 440. For example, in *Manetti-Farrow* the Ninth Circuit allowed a
 9 variety of related companies and high-ranking individuals in those companies to invoke a
 10 forum selection clause in a contract executed by only one of the related companies. 858
 11 F.2d at 514 n.5. Alternatively, the closely-related doctrine may apply when a non-signatory
 12 was involved in negotiating the contract containing the forum selection clause. *See, e.g.*,
 13 *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 63 (3d Cir. 2018). Such
 14 involvement often means it was “foreseeable” the non-signatory would be subject to the
 15 forum selection clause. *Id.* at 64. Nothing like these two applications is present here.

16 Plaintiff has not alleged it has an ownership interest or affiliation with GoDaddy,
 17 Domains by Proxy, or the unknown individuals. Nor has Plaintiff alleged it was involved
 18 in the contract negotiations between the unknown individuals, GoDaddy, and Domains by
 19 Proxy. Instead of citing to any relationship with a signatory or involvement in the
 20 negotiations, Plaintiff seems to argue the contractual language itself establishes the
 21 unknown individuals consented to be sued in Arizona for all claims connected to use of the
 22 domain names.

23 Plaintiff cites contractual language that the unknown individuals agreed “any action
 24 relating to or arising out of this Agreement,” must be brought in Arizona. (Doc. 15 at 3).
 25 Plaintiff does not explain, however, how its disputes with the unknown individuals relate
 26 to or arise out of the agreements. In general, disputes relate to or arise out of an agreement
 27 when the dispute will require interpretation of the agreement’s language. *See Manetti-*
Farrow 858 F.2d at 514 (9th Cir. 1988) (“Whether a forum selection clause applies to tort

1 claims depends on whether resolution of the claims relates to interpretation of the
 2 contract.”); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1047 (9th Cir. 2009) (claims
 3 did not “arise out of or relate directly to” agreement because claims did not require
 4 “examination of any provisions” of the agreement). Plaintiff’s position that all possible
 5 disputes with non-signatories that have some connection to the domain names must be
 6 brought in Arizona would stretch the contractual language too far. Cf. *Prudential Ins. Co.*
 7 *of Am. v. Shenzhen Stone Network Info. Ltd.*, 58 F.4th 785, 792 (4th Cir. 2023)
 8 (“GoDaddy’s Registration Agreement does not require the registrant to submit to
 9 jurisdiction in Arizona for *all* legal disputes.”).

10 The only support Plaintiff cites for its position is *Productive People, LLC v. Ives*
 11 *Design*, 2009 WL 1749751, at *2 (D. Ariz. June 18, 2009). That case, however, involved
 12 different contractual language than what is found here. The contractual language in
 13 *Productive People* stated the forum selection clause would apply to any litigation involving
 14 “use of” the domain name. *Id.* There is no such language here. And without similar
 15 language, *Productive People* does not help Plaintiff. Accordingly, Plaintiff is not entitled
 16 to invoke the forum selection clauses in the unknown individuals’ agreements with non-
 17 parties.

18 In amending its complaint Plaintiff alleged in rem claims against the five domain
 19 names. Such claims require allegations “the domain name violates any right of the owner
 20 of a mark.” 15 U.S.C. § 1125(d)(2)(A)(i). “Domain name” is statutorily defined as “any
 21 alphanumeric designation which is registered with or assigned by any domain name
 22 registrar, domain name registry, or other domain name registration authority as part of an
 23 electronic address on the Internet.” 15 U.S.C.A. § 1127. Thus, the statute uses “domain
 24 name” to refer to the “electronic address” of a website, not the contents of the website
 25 found at that address. Based on that, Plaintiff’s allegations that the five domain names
 26 present a plausible basis for in rem jurisdiction under 15 U.S.C. § 1125 is puzzling.

27 The Temu marks use the word “temu,” while the domain names identified in the
 28 complaint contain nothing similar. The five allegedly violative domain names are:

- 1 • employerdictionary.com;
- 2 • cryptocurrencybettting.com;
- 3 • comboarchives.com;
- 4 • toughestgirlalive.com; and
- 5 • myelectronicshub.website.

6 Plaintiff alleges these domain names are “identical and confusingly similar to the TEMU
 7 Marks or use the TEMU Marks,” but Plaintiff has not explained what aspect of these
 8 domain names it is claiming as “identical and confusingly similar.” (Doc. 16 at 13).
 9 Instead of the domain names using the Temu marks, Plaintiff’s allegations are that the
 10 websites found at those addresses are misusing the Temu marks. Plaintiff has not cited any
 11 authority that 15 U.S.C. § 1125(d)(2)(A)(i) allows for in rem claims against domain names
 12 based exclusively on the content of the websites.

13 Plaintiff is entitled to protect its trademarks and, assuming the unknown individuals
 14 are misusing the Temu marks, Plaintiff likely is entitled to relief in some forum. But the
 15 Court cannot grant an injunction against the unknown individuals without a plausible basis
 16 for concluding it has personal jurisdiction over those individuals. Plaintiff is free to file a
 17 renewed motion for injunctive relief if it can make a minimal showing of personal
 18 jurisdiction over the unknown individuals.¹ Alternatively, Plaintiff may file a renewed
 19 motion identifying the legal authority that would allow the Court to exercise in rem
 20 jurisdiction over domain names that bear no resemblance to the Temu marks.

21 Accordingly,

22 ...

23 ...

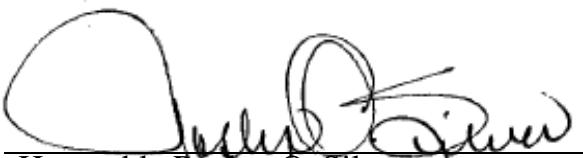
24 ...

25 ¹ The need to establish personal jurisdiction will remain even if Plaintiff does not renew its
 26 request for injunctive relief. Assuming Plaintiff is able to complete service of process but
 27 the unknown individuals do not appear, Plaintiff will need to establish personal jurisdiction
 28 before the Court could enter default judgment. “When entry of judgment is sought against
 a party who has failed to plead or otherwise defend, a district court has an affirmative duty
 F.3d 707, 712 (9th Cir. 1999).

1 **IT IS ORDERED** the Motion for Temporary Restraining Order (Doc. 10) is
2 **DENIED WITHOUT PREJUDICE.**

3 Dated this 4th day of December, 2023.

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Honorable Roslyn O. Silver
Senior United States District Judge